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CHARLES ELMORE

No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1931

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

CHARLES BENSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 19

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR the Seventh Compensation District of the United States Employees' Compensation Commission, petitioner

v.

CHARLES BENSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the brief for the respondent filed in this case two arguments have been advanced to which it is desired to make reply in this brief. These are: (1) that the questions relied on as error in this Court were not raised in the courts below and consequently are not open for review here; and (2) that the question whether Knudsen was in fact employed by Benson was a jurisdictional question

which required judicial determination in the district court despite the finding of the Deputy Commissioner.

I

We believe that the record shows plainly that the questions relied on in this Court are properly open for review. The bill of complaint in the district court included as an exhibit (R. 7–8) the findings of fact and the award of the Deputy Commissioner. One of these findings was that "the claimant above named was in the employ of the employer above named." Both the Deputy Commissioner and the claimant filed motions to dismiss (R. 12–14, 14–16) in which the following, among other, reasons for dismissal of the bill were advanced (R. 13, 15):

> 2. The facts alleged do not show that there was no competent evidence before the deputy commissioner to support his order sought to be enjoined.
>
> 3. For aught that appears, the evidence before the deputy commissioner was in conflict, and the order complained of was based on the deputy commissioner's findings on disputed issues of fact, which findings are supported by competent evidence.
>
> 4. Because the findings of the deputy commissioner on issues of fact are conclusive, unless there is no competent evidence to sustain such findings; and, for aught alleged, evidence was offered to sustain such findings.

5. Because it appears that the order sought to be enjoined was an order of an officer of the administrative department of the Federal Government; and it is not alleged that there was no competent evidence before said officer to support his findings upon which the order sought to be enjoined is based.

6. Because the bill of complaint does not set forth, in whole or in part, the evidence or proof which was submitted to the deputy commissioner at the hearing on which the order, prayed to be enjoined, was entered.

The record then shows that the motion to dismiss was argued in open court and taken under submission. (R. 16.) Thereafter the court rendered its opinion, upon which an order was entered referring to the opinion and overruling the motion to dismiss. (R. 18–25, 26.) The order itself recites that the respondents each except to the ruling. (R. 26.) The grounds of the respondents' motions were thus not only shown in the motions themselves (R. 13, 15) but the court, in denying the motions, concluded that the statute authorized the court to go into the real facts and grant a hearing *de novo;* that the proper court for an injunction to be brought was the admiralty side of the court; that the motion to dismiss would be overruled, and that the court would grant a hearing on the facts and the law (R. 25). To this ruling exceptions were allowed in the order of the court. (R. 26.)

Thereafter the claimant and the Deputy Commissioner took part in a trial *de novo* before the district court which was a necessary consequence of the order overruling their motion to dismiss, to which order they had excepted. At this trial *de novo* the record of proceedings before the Deputy Commissioner was offered and received in evidence. (R. 83–176.) But the Court did not read this record. (R. 176.) In its decree after reciting the *de novo* hearing and its opinion that complainant was not in fact the employer of the respondent Knudsen at the time of the latter's injury and that the complainant Charles Benson should have a decree in his favor, the Court proceeded to decree and adjudge that Knudsen was not in Benson's employ at the time his injuries were sustained and was not entitled to recover therefor from Benson any sum or sums by virtue of the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the award was not in accordance with law, that the respondents should both be restrained and enjoined from enforcing it, and that the claim for compensation should be rejected and dismissed. (R. 176–177.) The decree itself recites that each of the respondents upon the rendition thereof reserved an exception thereto, and to each paragraph thereof separately. (R. 177.)

Thereafter the respondents filed assignments of error in which the present question was expressly raised. (R. 178–180, 181–183.) The Circuit Court of Appeals considered the question and decided it

(R. 185–190), and the question was assigned as error in this Court. We believe that these references to the record make it clear that the question which we are urging is properly presented on the record.

II

The respondent contends that the question whether Knudsen was or was not in Benson's employ at the time of the injury is a "jurisdictional" question on which the finding of fact of the Deputy Commissioner is not conclusive. Whether or not the question is "jurisdictional" must depend upon the power which has been granted to the Deputy Commissioner. The question thus becomes one of the proper construction of the Longshoreman's Act.

An examination of the Act discloses an intention to grant very broad powers to the Deputy Commissioner with respect to the determination of questions which are disputed before him. Section 19 (a) provides for the filing of claims and that—

> the deputy commissioner shall have full power and authority to hear and determine *all questions* in respect of such claim. (Italics ours.)

By Section 20 it is provided that in the absence of substantial evidence to the contrary it shall be presumed "that the claim comes within the provisions of this Act." Clearly Congress had power to grant the Deputy Commissioner authority to determine the question of fact involved in the

present case; and the statute discloses the purpose of Congress to grant the Deputy Commissioner full authority to determine *all questions* raised before him.

The precise question of fact raised before the Deputy Commissioner in the present case was whether Knudsen was an employee of Benson, or on the other hand, as Benson claimed, an independent contractor. The respondent cites several decisions of state courts to the effect that such a question is a jurisdictional one which can not finally be determined by an administrative commission. Of course, the question depends in each State upon the language of the Act granting power to the commission and State decisions, we feel, are of little aid in considering the present question. Nevertheless we believe that practically all of the State decisions support the view that the administrative determination of the question whether the claimant was in fact employed or not is conclusive on the courts when it is supported by the evidence. This result has been reached in the State cases which are listed below. Except where it is otherwise indicated, the issue in these cases was the same as that involved in the present case, namely, whether the claimant was an employee or an independent contractor.

California:

Hillen v. *Industrial Accident Commission,* 199 Cal. 577 (whether claimant was an employee or not).

York Junction Transfer & Storage Co. v. *Industrial Accident Commission,* 202 Cal. 517.

Colorado: *Index Mines Corporation* v. *Industrial Commission,* 82 Colo. 272 (whether employee or colessee).

Georgia: *Ocean Accident & Guarantee Corp.* v. *Wilson,* 36 Ga. App. 784.

Idaho: *Taylor* v. *Blackwell Lumber Co.,* 37 Idaho 707.

Illinois:

Cinofsky v. *Industrial Commission,* 290 Ill. 521.

Franklin Coal Co. v. *Industrial Commission,* 296 Ill. 329.

Indiana:

A. E. Norris Coal Co. v. *Jackson,* 80 Ind. App. 423.

Riley v. *Hunt,* 85 Ind. App. 647 (claimant held not an employee and finding held conclusive on his appeal).

Garden City Sand Co. v. *Abney,* 85 Ind. App. 657.

Iowa:

Root v. *Shadbolt & Middleton,* 195 Iowa 1225, 1237 (whether claimant was employed by A or B).

Murphy v. *Shipley,* 200 Iowa 857 (same).

Massachusetts:

Churchill's Case, 265 Mass. 117.

Beckford's Case, 268 Mass. 221 (claimant held not an employee and this finding held conclusive on his appeal).

Hill's Case, 268 Mass. 491.

Missouri: See *Kersey* v. *Conrad,* 30 S. W. (2d) 167, 169 (Mo. App.; not officially reported).

New York: *Matter of Dale* v. *Saunders Bros.,* 218 N. Y. 59 (whether claimant was employed by A or B).

Oklahoma:

Missouri Valley Bridge Co. v. *State Industrial Commission,* 86 Okla. 209.

Federal Mining & Smelting Co. v. *Thomas,* 99 Okla. 24.

Oklahoma Pipe Line Co. v. *Lindsey,* 113 Okla. 296.

Pennsylvania: *Belmonte* v. *Connor,* 263 Pa. 470.

The decisions upon which the respondent relies are cited on page 21 of his brief. We believe that most of these cases are distinguishable.

Nogueira v. *New York, N. H. and H. R. Co.,* 281 U. S. 128, apparently has no bearing on the present question. *Crowell* v. *Benson,* 45 F. (2d) 66, is the decision of the court below.

In *Pine* v. *State Industrial Commission,* 108 Okla. 185, it appeared that at the time of the injury the statute then in force (Section 1, Art. 2, c. 246, Oklahoma Laws, 1915; Oklahoma Comp. Stat. 1921, Sec. 285) provided "that the provisions of this Act shall not apply to any employer unless he shall employ more than two workmen."

It was held that the question whether there were more than two or more employees was a jurisdictional matter which could be raised at any time.

There was no evidence in the record to show that there were more than two employees, and the court said that the question thus raised was not one of fact but one of law as to the existence of any evidence to support the jurisdiction of the Commission.

Borgnis v. *Falk Co.*, 147 Wis. 327, was one of the early cases in which the constitutionality of workmen's compensation laws was considered. In holding the Wisconsin elective compensation act constitutional the court said that jurisdictional questions could be reviewed by the courts. But the only jurisdictional question mentioned was whether the employer had elected to come under the act or not, and even that question was not directly involved in the case.

Hunter v. *Colfax Consolidated Coal Co.*, 175 Iowa 245, contains a dictum (p. 318) to the effect that the question of employment is jurisdictional. This was followed in *Bidwell Coal Co.* v. *Davidson*, 187 Iowa 809. But the Iowa Court since that decision has decided to the contrary. In *Root* v. *Shadbolt & Middleton*, 195 Iowa 1225, 1237, *supra*, and in *Murphy* v. *Shipley*, 200 Iowa 857, *supra*, it was held that the question whether the claimant was employed by A or by B was a question of fact on which the finding of the Commission was conclusive when supported by the evidence.

The decisions cited by the respondent from Illinois hold that jurisdictional questions may be re-

viewed by the courts, but none of them involves precisely the issue presented in the present case. *Courter* v. *Simpson Construction Co.*, 264 Ill. 488, decided only that, under the Illinois Constitution, the provision in the Workmen's Compensation Act for direct review of orders of the Commission by the Supreme Court was invalid. In *Uphoff* v. *Industrial Board,* 271 Ill. 312, the court made the statement that it might review jurisdictional questions, but the issue in the case was whether the defendant, a farmer, was of the class of employers who were subject to the provisions of the Act. In *Hahnemann Hospital* v. *Industrial Board,* 282 Ill. 316, the issue was whether the defendant's business was extra hazardous so as to make it subject to the Act. The finding of the commission that the claimant was employed was upheld. In *Thede Bros.* v. *Industrial Commission,* 285 Ill. 483, the question whether the claimant's employment was casual or not was held jurisdictional and subject to review by the courts. In *Paul* v. *Industrial Commission,* 288 Ill. 532, the court repeated the statement that it was free to determine jurisdictional questions; but the only question involved was whether the employer had elected to come under the Act.

When the precise question was presented to the Illinois court it held that the Commission's finding that the claimant was an employee and not an independent contractor was conclusive when there was evidence to support it. *Cinofsky* v. *Industrial*

Commission, 290 Ill. 521, *supra; Franklin Coal Co.* v. *Industrial Commission,* 296 Ill. 329, *supra.*

The respondent cites two cases from California (*Donlon Bros.* v. *Industrial Accident Commission,* 173 Cal. 250; *Roberts* v. *Industrial Accident Commission,* 52 Cal. App. 31) in which it was held that the question whether the claimant was an employee or an independent contractor was a jurisdictional question which was open to review in the courts. Other cases reaching the same result are: *Great Western Power Co.* v. *Pillsbury,* 170 Cal. 180; *Western Indemnity Co.* v. *Pillsbury,* 170 Cal. 686. These cases undoubtedly did represent the law of California until about ten years ago. But since that time the California Supreme Court has twice held that a finding that the claimant was an employee and not an independent contractor is conclusive when supported by evidence, and we believe that this is the law in California at the present time. *Hillen* v. *Industrial Accident Commission,* 199 Cal. 577, *supra; York Junction Transfer & storage Co.* v. *Industrial Accident Commission,* 202 Cal. 517, *supra.*

The final case cited by the respondent is *Industrial Commission* v. *Evans,* 52 Utah 394. The respondent relies on a dictum appearing at page 404. It appeared that under the terms of the Utah Act some employers were subject to its provisions and some were not. The only question decided by the court was that whether a certain

employer was subject to the Act or not is a jurisdictional question which may be reviewed by the courts. No question was raised as to whether the claimant involved was an employee or not.

CONCLUSION

We believe that the questions now urged in our brief are properly presented on the record and that the court below erred in disregarding the findings of the Deputy Commissioner and the evidence in support thereof and determining *de novo* the issue of employment.

Respectfully submitted.

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OCTOBER, 1931.

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vs.

CHARLES BENSON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION

NO FINDING OF FACTS BY COMMISSIONER

In the case at bar, because the Commissioner did not make any Finding of Facts, the judgment of the District Court and that of the Circuit Court of Appeals is right, no matter what the rule may be in cases where a proper Finding of Facts has been made.

Here the Deputy Commissioner did not make any Finding of Facts upon which he based his con-

clusion that the relationship of employer and employee existed between the parties, but merely stated his legal conclusion that the relationship existed. The Circuit Court's opinion further points out that it could not be ascertained from the alleged Finding of Facts as made by the Deputy Commissioner, what facts he considered to have the result of creating that relationship. The opinion of Circuit Judge Walker on this point states:

> "If the court was restricted to a consideration of only the evidence which the deputy commissioner had before him, an anomalous situation was presented in the instant case. As above indicated, the only conclusion stated by the deputy commissioner on the subject of the relationship between the claimant and appellee was the one found in the above set out quotation from the deputy commissioner's order. That was a statement of his legal conclusion that the relationship mentioned existed. What facts he considered to have the result of creating that relationship are not disclosed. Though in the hearing before him there was testimony tending to prove facts from which the existence of that relationship arose, it was not made to appear that the deputy commissioner in reaching his legal conclusion had in mind such facts, or that he was influenced by that evidence or accorded to it any probative value. There was nothing before the court to negative the inference that the stated legal conclusion of the deputy commissioner was based entirely on what he or some other person saw or heard in an investigation or

inquiry other than in the hearing in which was adduced evidence which was brought before the court. What was seen or heard in such other investigation or inquiry was not made known to the court in any way. The record does not show that the deputy commissioner found any fact or state of facts having any bearing on the question of the existence vel non of the relation of employer and employee between the appellee and the claimant. It does not show that evidence produced in the hearing before the deputy commissioner supported any conclusion of fact reached by him with reference to any relation between the claimant and the appellee. This being so, it does not seem that it properly can be affirmed that evidence disclosed to the court supported any conclusion of fact on that subject actually reached by the deputy commissioner. It can not well be inferred or supposed that it was intended to require a court to give conclusive effect to a finding of fact made by an executive official when it is not made known to the court what that finding was, or that evidence which was before that official supported that finding."

Rec. P. 301.

Absent any true Finding of Facts, the District Judge clearly did not err in proceeding to hear the case de novo when it came on for trial before him, and his action in so doing manifestly contributed more to a speedy disposition of the matter than would have ensued had he merely remanded the

cause, to the Commissioner with instructions to find the facts.

Whatever may be the rule where the Commissioner has made a proper Finding of Facts, and where that finding shows that the conclusion of the Comsioner was reached solely upon the evidence adduced at the hearing, it is submitted that the Circuit Court properly affirmed the action of the District Court in granting a trial de novo in the instant case.

Besides, the right to a trial de novo by a court of competent jurisdiction is clearly established by this court in the case of Liu Hop Fong vs. United States, 209 U. S. 453, 461-2. In the instant case there exists every consideration that led the Supreme Court of the United States to hold in the above cited case that Liu Hop Fong was entitled to a trial de novo.

The power of Congress to legislate in the field covered by the Longshoremen's and Harbor Workers Compensation Act rests entirely upon Federal jurisdiction over causes of admiralty and maritime jurisdiction. It results that a petition under the Act to review an award made by the Commissioner is properly heard on the admiralty side of the court, and the decision by this court in Axel Langnes vs. Winfield A. Green (case No. 38 decided February 24, 1931) lends support to that idea and to the pro-

position that the District Judge properly granted a trial de novo upon the facts as well as the law.

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March 4th, 1931.

CERTIFICATE OF SERVICE ON OPPOSING COUNSEL

I hereby certify that on the 4th day of March, 1931, I mailed a copy of the foregoing brief to the Solicitor General of the United States, addressed to him at Washington, D. C., by registered mail, postage prepaid, and that on the same day I delivered a copy of said brief to Messrs. Pillans, Cowley & Gresham, of Mobile, Alabama, Solicitors for J. B. Knudsen.

VINCENT F. KILBORN,
Solicitor for Respondent, Benson.